

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ASATA D. LOWE,

Petitioner,

v.

No.: 3:11-cv-529
(PHILLIPS/SHIRLEY)

BRUCE WESTBROOK, Warden,

Respondent.

MEMORANDUM

This petition for the writ of habeas corpus under 28 U.S.C. § 2254 was filed *in forma pauperis* in the United States District Court for the Middle District of Tennessee, Nashville Division, and transferred to this Court. For the reasons stated below, the respondent shall not be required to file an answer or other pleading to the petition and this petition will be **DISMISSED WITH PREJUDICE.**

Petitioner was convicted in the Circuit Court for Blount County, Tennessee, of two counts of first degree premeditated murder and one count of especially aggravated robbery. He previously filed a § 2254 petition in this Court attacking the same convictions; the previous petition was denied on the merits. *Asata D. Lowe v. James Fortner, Warden*, Civil Action No. 3:08-cv-489 (E.D. Tenn. March 23, 2010) (Judgment Order).

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), effective April 24, 1996, the petitioner cannot file a second or successive § 2254 petition in the district court until he has moved in the United States Court of Appeals for the Sixth Circuit for an order authorizing the district court to consider the petition. This Court has not received an order from the Sixth Circuit authorizing the court to consider the pending petition.

The Court notes that this is at least the third successive habeas corpus petition that petitioner has filed. *See Lowe v. Westbrook*, Civil Action No. 3:11-cv-80 (E.D. Tenn. Feb. 23, 2011) (Order transferring action to United States Court of Appeals for the Sixth Circuit as a second or successive habeas corpus petition), *appeal dismissed*, No. 11-5242 (6th Cir. March 15, 2011) (order granting motion to voluntarily dismiss appeal); *Lowe v. Westbrook*, Civil Action No. 3:11-cv-134 (E.D. Tenn. March 22, 2011) (Order transferring action to United States Court of Appeals for the Sixth Circuit as a second or successive habeas corpus petition), *appeal dismissed*, No. 11-5349 (6th Cir. May 5, 2011) (order dismissing action for lack of prosecution).

The Court further notes that petitioner claims to be filing a habeas corpus petition pursuant to 28 U.S.C. § 2241, presumably to avoid dismissal as a successive petition. Petitioner cannot, however, use § 2241 to avoid the second or successive requirements of § 2254. *See Rittenberry v. Morgan*, 468 F.3d 331, 337-38 (6th Cir. 2006) (28 U.S.C. § 2241 does not provide a separate "gate" through which state prisoners may seek habeas corpus relief from their convictions).

Under the circumstances, the petition for the writ of habeas corpus will be **DENIED** as a second or successive petition and this action will be **DISMISSED WITH PREJUDICE**. All pending motions will be **DENIED** as **MOOT**. A certificate of appealability **SHALL NOT ISSUE** in this action. 28 U.S.C. § 2253(c).

In addition to the above, this Court has carefully reviewed this case pursuant to 28 U.S.C. § 1915(a) and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court hereby **DENIES** the petitioner leave to proceed *in forma pauperis* on appeal. See Rule 24 of the Federal Rules of Appellate Procedure.

AN APPROPRIATE ORDER WILL ENTER.

s/ Thomas W. Phillips
United States District Judge